No. 09-856

Supreme Court, U.S.
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In The
Supreme Court of the United States

ANGELA MONTGOMERY,

Petitioner,

v.

WYETH, F/K/A AMERICAN HOME PRODUCTS CORPORATION, *ET AL.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REVISED QUESTIONS PRESENTED

Whether Petitioner waived her right to argue that the MDL court was the only court which could rule on her Settlement Agreement arguments, when Petitioner elected to present them to the Eastern District of Tennessee and the Sixth Circuit, courts with subject matter jurisdiction over the case.

Whether application of a state Statute of Repose and a negotiated term of the Settlement Agreement was in accordance with Petitioner's due process rights and previous MDL court rulings.

PARTIES TO THE PROCEEDING

The following parties appeared before the Sixth Circuit Court of Appeals:

Petitioner – Angela Montgomery

Respondents – Wyeth, f/k/a American Home Products Corporation; AHP Subsidiary Holding Corporation, f/k/a Wyeth-Ayerst Laboratories Company; and Wyeth Pharmaceuticals Inc., f/k/a Wyeth-Ayerst Pharmaceuticals Inc.

Amicus Curiae – Class Counsel in *Brown v. Wyeth*

CORPORATE DISCLOSURE STATEMENT

Respondents identified as Wyeth, f/k/a American Home Products Corporation[1]; AHP Subsidiary Holding Corporation[2], f/k/a Wyeth-Ayerst Laboratories Company; and Wyeth Pharmaceuticals Inc. [3], f/k/a Wyeth-Ayerst Pharmaceuticals Inc.,

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[1] On March 11, 2002, the name of American Home Products Corporation changed to Wyeth.

[2] On January 31, 2007, AHP Subsidiary Holding Corporation was merged into Wyeth.

[3] On March 22, 2002, Wyeth-Ayerst Pharmaceuticals Inc., a New York corporation, changed its name to Wyeth Pharmaceuticals Inc. On December 23, 2002, Wyeth Pharmaceuticals Inc. was merged into Wyeth Subsidiary Corporation, a Delaware Corporation. Wyeth Subsidiary Corporation changed its name to Wyeth Pharmaceuticals Inc.

provide the following corporate disclosure statement pursuant to Rule 29.6.

1. *Parent Corporations.* Pfizer Inc. is the parent corporation of Wyeth LLC[4] (sometimes identified as Wyeth, Wyeth Inc., or American Home Products). Wyeth Pharmaceuticals Inc. is a wholly owned subsidiary of Wyeth LLC. Wyeth-Ayerst International, Inc. is a wholly owned subsidiary of Wyeth LLC.

2. *Publicly Held Companies Owning Ten Percent (10%) or More.* Pfizer Inc. owns ten percent (10%) or more of Wyeth LLC.

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[4] On November 9, 2009, Wyeth converted from a Delaware corporation to a Delaware limited liability company and is now known as Wyeth LLC.

TABLE OF CONTENTS

Page

REVISED QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vi

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI 1

INTRODUCTION 1

COUNTER-STATEMENT OF THE CASE 1

REASONS FOR DENYING THE PETITION 2

I. THE SIXTH CIRCUIT COURT OF APPEALS DECISION DOES NOT RAISE A QUESTION WORTHY OF THIS COURT'S ATTENTION 3

A. Petitioner Never Raised a Due Process Argument Below 3

B. The Sixth Circuit Properly Applied Tennessee Law 4

II. THE EASTERN DISTRICT OF TENNESSEE AND THE SIXTH CIRCUIT HAD SUBJECT MATTER JURISDICTION OVER PETITIONER'S CLAIMS 7

CONCLUSION 8

APPENDIX:

Order of
The United States District Court
For the Eastern District of Tennessee
Re: Denying Plaintiff's
Motion to Alter or Amend Judgment
entered May 22, 2008 ..... App. 1

TABLE OF AUTHORITIES

Page(s)

CASES

Freeport-McMoRan, Inc., v. K N Energy, Inc.,
498 U.S. 426 (1991) 7

In re Vioxx Products Liability Litigation,
MDL NO. 1657, 2007 WL 3353404
(E.D. La. Nov. 8, 2007) 7

Jones v. Five Star Eng'g, Inc.,
717 S.W.2d 882 (Tenn. 1986) 4

Kochins v. Linden-Alimak, Inc,
799 F.2d 1128 (6th Cir. 1986) 4

Mathis v. Eli Lilly & Co.,
719 F.2d 134 (6th Cir. 1983) 4

Molnar v. Care House,
2009 WL 5125520 (6th Cir. Dec. 29, 2009) 4

Montgomery v. Wyeth,
540 F. Supp. 2d 933 (E.D. Tenn. 2008),
aff'd, 580 F.3d 455 (6th Cir. 2009) 1, 5

Spence v. Miles,
37 F.3d 1184 (6th Cir. 1994) 7

Spietsma v. Mercury Marine,
537 U.S. 51 (2002) 3-4

Thomas v. City of Detroit,
299 F. App'x 473 (6th Cir. 2008) 4

Winningham v. Ciba-Geigy Corp.,
156 F.3d 1234 (6th Cir. 1998) 4

STATUTES

28 U.S.C. § 1291 7

28 U.S.C. § 1332 7

28 U.S.C. § 1332(a) 7

28 U.S.C. § 1332(c)(1) 7

T.C.A. § 29-28-102(6) 7

T.C.A. § 29-28-103(a) 7

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

Respondents Wyeth LLC, AHP Subsidiary Holding Corporation, and Wyeth Pharmaceuticals, Inc. ("Wyeth") respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Opinion and Judgment of the Court of Appeals for the Sixth Circuit dated August 28, 2009.

COUNTER-STATEMENT OF THE CASE[1]

The Eastern District of Tennessee and the Sixth Circuit properly decided this case. Petitioner's claims were barred by the Tennessee Statute of Repose ("SOR"), which was an available defense under Tennessee state law and not barred by the negotiated Settlement Agreement. The Eastern District of Tennessee opinion and the subsequent Sixth Circuit opinion upholding the lower court ruling do not violate Petitioner's due process rights, do not conflict with any decision of the MDL court, and do not otherwise raise a question worthy of this Court's attention.

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[1] A complete history of this litigation can be found in the Tennessee district court and Sixth Circuit opinions. *See Montgomery v. Wyeth*, 540 F. Supp. 2d 933 (E.D. Tenn. 2008), *aff'd*, 580 F.3d 455 (6th Cir. 2009). Wyeth focuses on facts most relevant facts here.

At no time until the filing of this Petition did Petitioner:

1. Raise any question about the jurisdiction of the Tennessee district court or Sixth Circuit to decide these issues.

2 Raise any question about a violation of her due process rights.

3. Claim that the Tennessee SOR was unconstitutional or argue that its application in this case violated her due process rights.

REASONS FOR DENYING THE PETITION

The decision rendered by the Sixth Circuit does not conflict with a decision of another Circuit Court or state Supreme Court, does not conflict with a previous decision of this Court, and does not involve a federal question that is ripe for this Court's review. In fact, Petitioner's only argument in this regard is an alleged conflict between the Sixth Circuit and the MDL court. Petitioner incorrectly states that permitting Wyeth to assert the Tennessee SOR defense is inconsistent with a finding that Petitioner was adequately represented by the class and would render the notice sent to class members in early 2000 misleading because it did not discuss the Tennessee SOR or urge Tennessee residents to opt-out. As discussed below, the terms of the Settlement Agreement were freely negotiated by the *Brown* class counsel. Attorneys who

represented class members had the opportunity to – and did – object to the terms. The Settlement Agreement was ultimately approved by the MDL court and Petitioner, along with each class member, is subject to its terms. Accordingly, the Sixth Circuit's application of the Tennessee SOR, a substantive provision of the law which barred Petitioner's claims outside of the context of the Settlement Agreement, did not violate Petitioner's due process rights or present a conflict with the MDL court.

Petitioner has waived any right to argue that application of the Tennessee SOR violated her due process rights and that the Eastern District of Tennessee and the Sixth Circuit lacked subject matter jurisdiction, as the arguments were not put before the Courts below. Moreover, the arguments are plainly wrong.

I. THE SIXTH CIRCUIT COURT OF APPEALS DECISION DOES NOT RAISE A QUESTION WORTHY OF THIS COURT'S ATTENTION.

A. Petitioner Never Raised a Due Process Argument Below.

Petitioner never raised a due process argument in the Eastern District of Tennessee or the Sixth Circuit. She did not claim that the Tennessee SOR was unconstitutional or argue that its application in this case violated her due process rights. As such, Petitioner has waived any right to argue it here. *See, e.g., Spietsma v. Mercury Marine,*

537 U.S. 51, 56 n.4 (2002) (deeming argument as to application of federal maritime law waived because it was not raised below); *Molnar v. Care House*, 2009 WL 5125520, *3 (6th Cir. Dec. 29, 2009) (refusing to address premature grant of summary judgment argument where appellant failed to raise it below); *Thomas v. City of Detroit*, 299 F. App'x 473, 477 (6th Cir. 2008) (deeming substantive due process argument waived where appellant did not present argument to district court).

B. The Sixth Circuit Properly Applied Tennessee Law.

The Sixth Circuit decision properly applied the Tennessee SOR in accordance with Tennessee law. The interpretation of the Tennessee SOR which applies to this case, does not present a question for this Court's review nor does it present a conflict between federal courts. Indeed the constitutionality of the Tennessee SOR is not up for debate, as this argument has been extensively litigated and repeatedly rejected under both Tennessee law and the U.S. Constitution.[2] More importantly, Petitioner

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[2] *See e.g., Mathis v. Eli Lilly & Co.*, 719 F.2d 134 (6th Cir. 1983) (upholding Tennessee SOR under U.S. Constitution); *Kochins v. Linden-Alimak, Inc*, 799 F.2d 1128, 1138 (6th Cir. 1986) (upholding Tennessee SOR under Tennessee Constitution and U.S. Constitution); *Winningham v. Ciba-Geigy Corp.*, 156 F.3d 1234 (6th Cir. 1998) (rejecting judicial expansion of statutory exceptions in Tennessee SOR for latent diseases not mentioned in statute); *Jones v. Five Star Eng'g, Inc.*, 717 S.W.2d 882, 883 (Tenn. 1986) (upholding Tennessee SOR under Tennessee Constitution). Both the Tennessee district court and Sixth Circuit similarly recognized that equitable arguments about the Tennessee SOR were for the Tennessee Legislature rather than for the courts.

never argued the constitutionality of the Tennessee SOR with the Courts below and therefore improperly raises that issue here.

Petitioner's arguments are incorrectly presented as due process arguments. In fact, Petitioner's arguments turn on an interpretation of a contract, an issue this Court need not consider. Although Petitioner continues to argue that the Tennessee SOR should not apply, the Tennessee district court and the Sixth Circuit properly held that the Settlement Agreement does not bar Wyeth from raising a Statute of Repose defense. As the Tennessee district court noted, the fact that the Settlement Agreement "fully preserve[d]" the class members' ability to assert future PPH claims under state law, therefore, was nothing more than an acknowledgement that the class did not include claims for PPH and that claims for PPH had not been settled. *Montgomery*, 580 F.3d at 465 ("the Settlement Agreement did not purport to dismiss PPH claims because they were never asserted in the first place"); Order denying Motion for Reconsideration, at 4 ("The class itself did not include claims for PPH."). As the district court explained:

> This was a contractual obligation. The settlement agreement guarded against the running of statutes of limitations but not against Tennessee's statute of repose. Rather, the settlement agreement acknowledged that PPH claims would have to be brought according to the substantive law of the

> states. In Petitioner's case, that substantive law bars her claim.

Id.

The availability of a state Statute of Repose defense, like every other provision, was a contractual provision in the Settlement Agreement to which all *Brown* class members had notice and an opportunity to object. Petitioner's claims were only "fully preserved" to the extent that they were otherwise available under the applicable substantive law. The Settlement Agreement did not alter the Tennessee SOR, or any state Statute of Repose, to extend the ripeness of claims indefinitely. Accordingly, the Tennessee district court and the Sixth Circuit properly applied the Tennessee SOR in accordance with Tennessee law. Petitioner's claims were barred by the Tennessee SOR and not by any provision in the Settlement Agreement.

Moreover, the perceived harm Petitioner claims is illusory. As the Tennessee district court found and the Sixth Circuit confirmed, even if Petitioner was not bound by the Settlement Agreement because she was somehow inadequately represented (a claim she has repeatedly disavowed), her claims would still have been barred by the

Tennessee SOR.[3] *See* Order denying Motion for Reconsideration, at 4 n.1.

II. THE EASTERN DISTRICT OF TENNESSEE AND THE SIXTH CIRCUIT HAD SUBJECT MATTER JURISDICTION OVER PETITIONER'S CLAIMS.

As Petitioner conceded in her Jurisdictional Statement before the Sixth Circuit, the Eastern District of Tennessee and Sixth Circuit unquestionably had subject matter jurisdiction over Petitioner's claims. Pursuant to 28 U.S.C. § 1332, a federal district court has subject matter jurisdiction when two circumstances relevant to this case are met: (1) complete diversity between the parties, and (2) an amount in controversy that exceeds $75,000. *See* 28 U.S.C. § 1332(a), (c)(1). This Court has "consistently held that if jurisdiction exists at the time an action is commenced, such jurisdiction may not be divested by subsequent events." *Freeport-McMoRan, Inc., v. K N Energy, Inc.*, 498 U.S. 426, 428 (1991). The Sixth Circuit also had jurisdiction over Petitioner's appeal based on 28 U.S.C. § 1291.

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[3] Wyeth was entitled to summary judgment under the Tennessee SOR because Wyeth presented undisputed evidence that the drug allegedly responsible for her injury, Pondimin, carried an expiration date required by law that was no later than September 2000, thereby giving Petitioner until September 2001 to file her Complaint under Tennessee law. *See* T.C.A. § 29-28-103(a); 29-28-102(6). *See Spence v. Miles*, 37 F.3d 1184 (6th Cir. 1994); *In re Vioxx Products Liability Litigation*, MDL NO. 1657, 2007 WL 3353404, *4 (E.D. La. Nov. 8, 2007) (dismissing claims of Tennessee residents based on eighteen month expiration date).

Further, Petitioner's argument that the lower courts lacked subject matter jurisdiction based on the MDL court's "continuing" and "exclusive" jurisdiction over the administration of the Settlement Agreement is ***not*** a non-waivable subject matter jurisdiction argument and therefore has no merit at this point. The fact that the MDL court retained "continuing" and "exclusive" jurisdiction merely establishes that the MDL court had subject matter jurisdiction to decide any Settlement Agreement issue and would have served as the exclusive forum if either party so requested. Petitioner waived the right to have the MDL court decide such issues by failing to invoke the MDL court's authority in a timely manner. It is well past the time for Petitioner to make this claim.

CONCLUSION

For all the above reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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February 19, 2010

APPENDIX

[ENTERED: May 22, 2008]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

ANGELA MONTGOMERY,

Plaintiff,

No. 1:05-CV-323

v.

Chief Judge Curtis L. Collier

WYETH, f/k/a American Home Products Corp., AHP SUBSIDIARY HOLDING CORPORATION f/k/a Wyeth-Ayerst, Laboratories Company; WYETH PHARMACEUTICALS, INC. f/k/a Wyeth-Ayerst Pharmaceuticals, Inc.,

Defendants.

ORDER

Before the Court is Plaintiff Angela Montgomery's motion to alter or amend the Court's judgment against her (Court File No. 110). The Court has carefully considered Plaintiff's briefs (Court File Nos. 111, 113) and Defendant Wyeth's brief (Court File No. 112), and concludes the judgment was correct. Accordingly, the Court **DENIES** Plaintiff's motion (Court File No. 110).

I. STANDARD OF REVIEW

Plaintiff makes her motion pursuant to Fed. R. Civ. P. 59(e), which authorizes a district court to alter or amend a judgment upon motion of a party no later than ten days after the judgment. A district court may grant such motion (1) to correct a clear error of law; (2) to account for newly-discovered evidence; (3) to accommodate an intervening change in controlling law; or, (4) to otherwise prevent manifest injustice. *Henderson v. Walled Lake Consol. Schs*, 469 F.3d 479, 496 (6th Cir. 2006).

Motions for reconsideration or to alter or amend a judgment are rarely granted. "In practice, because of the narrow purposes for which they are intended, Rule 59(e) motions typically are denied." 11 Charles Alan Wright, et al., Federal Practice and Procedure Civil 2d § 2810.1; *see also Ruscavage v. Zuratt*, 831 F.Supp. 417, 418 (E.D. Pa. 1993) (noting Rule 59(e) motions "should be granted sparingly because of the interests in finality and conservation of judicial resources").

II. DISCUSSION

This is a products liability case in which Plaintiff alleged Defendant's diet drug Pondimin caused her to develop Primary Pulmonary Hypertension (PPH). Relying on a rarely-invoked portion of Tennessee's product liability statute of repose, Defendant moved for summary judgment, which the Court granted (Court File No. 109). In its decision, the Court suggested the statute of repose as applied was unduly harsh, but concluded it applied

to this case (Court File No. 108). Plaintiff asks the Court to alter its previous judgment and allow her case to proceed without the need for a time-consuming appeal. However, the Court concludes its original decision is correct.

A. When PPH Claims Were Originally Made

One of Plaintiff's original arguments in opposition to summary judgment was that her PPH claim has been pending since 1999 (and thus not barred by the statute of repose) because it was part of a class action, MDL 1203, on behalf of people who ingested Pondimin. The Court rejected this claim, concluding that PPH claims were not part of the class action and were subject to state laws, such as the statute of repose.

In this motion, Plaintiff contends the Court's conclusion leads to another conclusion: that the class in MDL 1203 was constitutionally deficient for not protecting the rights of people with latent PPH claims. Because the MDL 1203 class was constitutionally adequate, Plaintiff contends this

Court must have erred.[1] Plaintiff's central argument is that she asserted her PPH claim in MDL 1203. The Court fully address this issue in its original Memorandum. Nevertheless, the Court will briefly address some of Plaintiff's arguments in her new motion.

Plaintiff points to language indicating that the class included "all persons who took Pondimin and/or Redux, *including necessarily those who did or would later suffer from PPH.*" It is clear from this language that people who had or would later suffer from PPH are included in the class along with all other persons who ingested Pondimin. But the class itself did not include claims for PPH. Rather, the class "fully preserve[d]" the right of class members to sue for PPH when they developed it. This was a contractual obligation. The settlement agreement guarded against the running of statutes of limitations but not against Tennessee's statute of repose. Rather, the settlement agreement acknowledged that PPH claims would have to be brought according to the substantive law of the states. In Plaintiff's case, that substantive law bars her claim.

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[1] Although Plaintiff's opening brief is unclear as to whether she is launching a collateral attack on the settlement in MDL 1203, her reply brief clarifies that she is not. Indeed, if she were to somehow successfully challenge the settlement, as was the situation in the case cited by Plaintiff, *Stephenson v. Dow Chem. Co.*, 273 F.3d 249 (2d Cir. 2001), then she would no longer be bound by the class settlement, but that would leave her in the same position as right now, forced to pursue a PPH claim under a state law that prohibits it.

B. Choice of Law

In opposing summary judgment, Plaintiff requested the Court apply Georgia law, under which the statute of repose would not apply. After evaluating Tennessee's choice of law rules, the Court concluded Tennessee law applies.

In the instant motion, Plaintiff contends her claim for breach of implied warranty must use Georgia law, and therefore her entire case must use Georgia law. She argues Georgia law is proper for that claim because the contract to purchase Pondimin was entered into in Georgia. As Defendant points out, however, the contract was entered into with a third party, not Defendant. Furthermore, Tennessee's product liability law governs regardless of whether an individual claim is labeled as breach of warranty. Tenn. Code Ann. § 29-28-102(6).

Plaintiff also contends Georgia law is applicable based on the policy interests of Georgia and Tennessee applicable to this case. Plaintiff argues that in evaluating the relevant policies of the forum, the Court should have considered those interests based on the facts of this case. *See, e.g., MacDonald v. GMC*, 110 F.3d 337, 344-45 (6th Cir. 1997) (evaluating interests of two states in applying their own laws to "this particular" claim). Although the Tennessee statute of repose bars recovery by people with long latency periods, Plaintiff notes that the actual purpose is to keep product liability insurance rates low, and this purpose is not actually accomplished by the statute of repose. Plaintiff makes a somewhat compelling point, but it is

diminished because insurance rates would reflect that Pondimin is expected to be used not only in the state of purchase. For instance, in this case, the pills were purchased in Georgia for use in Tennessee. Regardless, Plaintiff's argument does not establish a clear error of law as to the decision to apply Tennessee law. The relevant policies of the states is only a part of the analysis, and Plaintiff's argument does not disturb the rest of the Court's analysis of the more significant relationship or the other principles of § 6 of the Restatement (Second) of Conflict of Laws.

In addition, Plaintiff's contention that the Court erred by referring to the "exclusive" use of Tennessee law is not persuasive. Although the parties certainly cited cases from other states in their briefs, there was no indication another state's law applied. In particular, the pleadings relied on Tennessee law. As Plaintiff mentions in her brief, her implied breach of warranty claim could not have survived in Georgia.

C. Fenfluramine

Plaintiff argued in opposition to summary judgment that some Pondimin was purchased in Europe and therefore not subjected to stability testing in the United States, which would mean an expiration date was not required by law and the statute of repose is not applicable. The Court rejected Plaintiff's contention, and does so again for the same reason. Although some fenflurmanine was purchased outside the United States, Defendant's

evidence still establishes that it manufactured all Pondimin tablets in the United States.

III. CONCLUSION

For the foregoing reasons, the Court **DENIES** Plaintiff's motion to alter or amend the Court's judgment against Plaintiff (Court File No. 110).

SO ORDERED.

ENTER:

/s/
CURTIS L. COLLIER
CHIEF UNITED STATES DISTRICT JUDGE